Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ManTech Field Engineering Corp.--Request for Reconsideration

File: B-246152.5

Date: December 17, 1992

David P. Metzger, Esq., and Gena E. Cadieux, Esq., Davis, Graham & Stubbs, for the protester.
Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Denial of entitlement to costs is affirmed where corrective action was not taken in response to clearly meritorious protest, and where protester does not demonstrate that decision was based on an error of fact or law.

DECISION

ManTech Field Engineering Corp. requests reconsideration of our decision denying its request for a declaration of entitlement to costs for a protest which we had dismissed as academic. ManTech Field Eng'g Corp.--Request for Declaration of Entitlement to Costs, B-246152.3, June 12, 1992, 92-1 CPD ¶ 514. ManTech contends that our decision erroneously failed to consider all the circumstances involved in the corrective action taken by the Department of the Army Intelligence and Security Command (INSCOM).

We affirm our decision denying entitlement to costs.

On October 9, 1991, ManTech filed a bid protest alleging that an award to Ball Corporation was improper for various reasons including: relaxation of a mandatory specification for the awardee, erroneous and improper evaluation of ManTech's proposal, failure to engage in meaningful discussions with ManTech, and application of unannounced criteria in the evaluation. In its agency report, and at a hearing conducted by our Office on December 10, INSCOM denied the allegations made by the protester. On December 19, INSCOM notified our Office that it intended to take corrective action by amending the RFP and reopening negotiations with Ball and ManTech, as a result of which, we dismissed the protest as academic. On January 8, 1992, ManTech filed a request for declaration of entitlement to

costs. In denying ManTech's request for entitlement, we addressed the area in which the agency had taken action, revision of the specification allegedly relaxed for Ball.

In its request for reconsideration, ManTech argues that our reasoning was flawed with regard to the relaxed specification issue and that we improperly ignored the agency's corrective action taken in response to its other protest issues. In addition, the protester contends that costs should be awarded when an agency takes late corrective action in response to protest allegations and asserts that our Office failed to follow this "standard."

ManTech misconstrues the standard for determining entitlement to costs. Under the Competition in Contracting Act of 1984, our Office may find an entitlement to costs only where we find that an agency's action violated a procurement statute or regulation. 31 U.S.C. § 3554(c)(1) (1988). Our Bid Protest Regulations provide that a protester may be entitled to reimbursement of its costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to a protest. 4 C.F.R. § 21.6(e) (1992). This does not mean that costs are due in every case in which an agency takes corrective action; rather, we may find an entitlement to costs only where an agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. Thus, as a prerequisite to entitlement to costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, i.e., not a close question. The mere fact that an agency takes corrective action does not establish that a statute or regulation had been clearly violated. See David Weisberg--Request for Declaration of Entitlement to Costs, B-246041.2, Aug. 10, 1992, 71 Comp. Gen. ___, 92-2 CPD ¶ 91; Carl Zeiss--Request for Declaration of Entitlement to Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ ___; Columbia Research Laboratories, Inc.--Request for Declaration of Entitlement to Costs, B-246186.2, June 10, 1992, 92-1 CPD ¶ 505; Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100.

Although our prior decision did not discuss every protest ground raised by ManTech, we considered all the circumstances involved in finding that INSCOM's corrective action was not taken in response to a clearly meritorious protest. Our reasoning on those grounds follows.

SECURITY CLEARANCES

The request for proposals (RFP) required offerors to propose qualified data systems personnel to maintain and generate necessary software and support documentation for certain systems at the 703d Military Intelligence Brigade. The RFP specifically provided that "[c]ontractor personnel will not be considered unless they can be cleared to Top Secret with a Special Background Investigation (TS/SBI) and have access adjudicated by 1 Oct. 1991." In its protest, ManTech alleged that at least one of Ball's proposed personnel should have been excluded from consideration because he had not had his clearance adjudicated as of October 1. After the protest hearing, the agency amended the RFP and reopened negotiations with Ball and ManTech.

ManTech argues that this action is in direct response to its protest of the Ball employee's lack of access adjudication. As stated in our prior decision, INSCOM did not take this corrective action because it had improperly waived a requirement for Ball. Rather, it concluded that the clearance requirement was misleading,[1] and it discovered that the Ball employee did not have the clearance actually needed.[2]

ManTech contends that INSCOM's "post-hoc" explanation should not be adopted by our Office. However, the record provides no basis to discount the explanation. Under the circumstances of this procurement, the original provision failed to adequately advise offerors of INSCOM's actual requirements, and provided a clearance procedure which apparently could not be met by other than cleared personnel working on the current contract.

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[1]The problem with the specification stems from the fact that not just "access" must be adjudicated. All Army security clearances must be adjudicated by its Central Personnel Security Clearance Facility (CCF), even where a clearance has been granted by the Department of Defense or another federal agency. Offerors could have been misled into believing that a security clearance granted by another agency would meet the RFP requirement. The phrase "can . . . have access adjudicated" is misleading since neither the offeror nor INSCOM has any control over when the CCF will act upon an adjudication request.

[2]Although the Ball employee had an SBI completed by another federal agency, his security clearance was never granted. Apparently the employee was unaware of this fact. Ball represented that all of its proposed personnel had a TS/SBI clearance and that only the employee's access adjudication was pending.

We found that the protest ground alleging relaxation of the requirement for Ball was not clearly meritorious since there was no "waiver" of a requirement for Ball. Rather, the solicitation did not state the agency's actual needs and, while Ball's employee did not have the clearance actually needed, neither Ball, the employee, nor the agency knew of this. Moreover, ManTech was not prejudiced by the acceptance of Ball's proposal since its own proposal did not meet the requirement. As stated in the RFP, the clearance requirement could only be met if an offeror proposed incumbent, cleared employees, and some of ManTech's proposed personnel were not working on the current contract.

In response, ManTech contends that its proposal of alternate personnel with current, Army approved clearances, working on other Army contracts, would have made relaxation of the specification unnecessary. While these employees might have had access adjudicated more quickly because of their existing clearances, there is simply no evidence that such access could or would have been granted automatically or within the one day between the September 30 contract award and the October 1 deadline. Thus, we find no basis to conclude that our original decision was erroneous.

EVALUATION OF MANTECH'S PROPOSAL

In its evaluation of ManTech's proposal, INSCOM questioned whether one of its proposed employees had the necessary experience: "a minimum of 3 years of management experience on a software development and/or maintenance project equivalent to the level of effort required for this contract." ManTech's response detailed the employee's experience, including experience gained as an assistant manager. Since not all of the employee's experience encompassed sole management responsibility, the evaluators, based in part upon their knowledge of the employee's experience, found the employee unqualified for the position. As a result of this and another deficiency, ManTech was eliminated from the competition. ManTech protested that the employee's experience was sufficient based on the criteria stated in the RFP. As part of its amendment of the statement of work, INSCOM made plain that the necessary management experience had to be "total."

ManTech contends that this amendment of the SOW--to make plain that someone like ManTech's employee was not qualified--constituted corrective action in direct response to its protest ground. The record supports the agency's determination that ManTech's proposed employee's experience did not meet the requirements as originally stated, and the agency so apprised ManTech during discussions. By amending the specification, INSCOM did not establish either that ManTech's employee met the qualifications as originally

stated, or that the solicitation was unclear. The agency simply emphasized to all offerors that anything less than "total" management responsibility was insufficient to meet the agency's minimum requirements. In our view, the original solicitation adequately stated this requirement, and ManTech's argument that its employee's experience met the requirement is without merit. Consequently, ManTech is not entitled to costs.

MEANINGFUL DISCUSSIONS

The RFP required offerors to propose an unspecified number of personnel, in four position areas, to perform software maintenance on the applicable systems. In the course of discussions, INSCOM questioned whether ManTech had proposed sufficient personnel to perform. The agency reminded ManTech that historically system maintenance required from 7 to 11 personnel and that ManTech had proposed personnel consistent with these numbers in the past. The agency concluded this discussion area as follows: "If you still feel that [the number of proposed][3] personnel are sufficient to accomplish all contract requirements, please explain explicitly how this can be done. Please note that the number of billets on the new contract will equal the number of positions proposed and will not be increased during the life of the contract." When ManTech asked if it should propose more personnel, the agency advised the protester that the number to offer was up to ManTech. The agency also orally informed ManTech that its proposal was technically acceptable and within the competitive range. ManTech's response detailed how the experience of its personnel would allow the firm to accomplish the mission with fewer employees than in the past. The evaluators found this response unacceptable and eliminated ManTech from the competition.

In its protest, ManTech argued that the oral statement regarding technical acceptability was misleading. In its request for reconsideration, ManTech argues that INSCOM took corrective action in direct response to this protest ground by restoring ManTech to the competitive range and by promising meaningful discussions. By advising ManTech of the personnel deficiency in its proposal and affording it the opportunity to submit a revised proposal, INSCOM arguably engaged in meaningful discussions with the protester. Federal Acquisition Regulation (FAR) §§ 15.610(c)(2), (5); Miller Bldg. Corp., B-245488, Jan. 3, 1992, 92-1 CPD ¶ 21. Even if the agency's references to the protester's proposal as "acceptable" and "in the competitive

[3]The number of personnel proposed by ManTech is proprietary information.

range," were misleading, they were not clearly so, and we cannot conclude on the record before us that ManTech's protest would have been sustained on this basis.[4]

Further, reopened negotiations, and the readmission of ManTech to the competitive range, were a result of the agency's recognition that the original competition was flawed due to an ambiguity in the clearance requirement and to the lack of a clearance for Ball's employee. Discussions are an integral part of reopened negotiations and the agency has a responsibility to make those discussions meaningful. FAR §§ 15.602(c)(2), (5). Thus the promise to conduct meaningful discussions during the reopened procurement does not establish the merit of ManTech's allegations concerning the sufficiency of prior discussions.

ManTech also contends that INSCOM's promise to ensure "impartial" evaluators is in response to ManTech's having proved that the evaluators had been unfair to ManTech. The evaluators' negative comments were perceived by ManTech as evidence of bias. In addition, the potential for bias in a re-evaluation was present in view of the history of litigation in this procurement. We do not agree that the agency's plan "to review the technical evaluators to ensure only impartial personnel perform those duties," represents an admission of bias or constitutes corrective action in response to a clearly meritorious protest ground. Rather, it merely reflects the agency's effort to take all possible steps to assure that the new evaluation is not open to question.

UNANNOUNCED CRITERION

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[4]In a related argument, ManTech contended that it also was misled during discussions since the agency apparently would not accept anyone without "total" management experience. Had it known of the true criterion, ManTech stated that it would have proposed a different employee. We find that INSCOM engaged in meaningful discussions by advising ManTech of its deficiencies and affording it the opportunity to revise its proposal. See Miller Bldg. Corp., supra. Here, the RFP advised that the employee for this position required 3 years' management experience on a project with a comparable level of effort and in discussions the agency specifically noted in writing that the proposal showed only 2 years of experience "most of which was as an assistant." This information highlighted the relevant period of experience and the likelihood that "assistant" experience was unacceptable.

ManTech also contended that INSCOM always believed that a minimum of seven personnel was required for technical acceptability and, therefore, no explanation it offered in its revised proposal would satisfy the evaluators. Thus, the amendment of the RFP to require a minimum of seven technical employees constitutes corrective action in response to this protest ground. We disagree.

While the amendment reflects the agency's recognition that at least seven personnel are required, we do not find that it establishes that the agency was unwilling to consider less than that number to perform the contract. ManTech was provided an opportunity to propose more personnel or to justify the number originally proposed.

Contrary to ManTech's assessment, there is evidence that the agency was willing to consider an explanation justifying the number of personnel proposed. For example, according to an agency evaluator, had ManTech's revised proposal included a plan to send home office personnel to assist whenever a problem developed in work load, then ManTech's proposal would have been viewed differently. The evaluators were unconvinced that the level of expertise among the proposed personnel, and a plan to have them each back each other up in case of a problem, was sufficient to handle the anticipated work load. While the agency has now concluded that it is better to specify a larger minimum to ensure that all offerors propose sufficient personnel, we do not find this corrective action to have been taken in response to a clearly meritorious protest ground.

CONCLUSION

ManTech has neither shown that our prior decision contains factual or legal errors nor has it presented information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a).

The decision denying entitlement to costs is affirmed.

Robert P. Murphy
for James F. Hinchman
General Counsel